the solicitor to comply with his undertaking. The following passage of the judgment is relevant:

> The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs Syarikat Alor Merah Sdn Bhd'. The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from 16 April 1974.

As stated in the *Rediffusion* case,[1] at this stage I am entitled to presume that the plaintiffs would be able to establish that the defendants did give the undertaking and that they had breached the undertakings, thereby causing the plaintiffs to suffer loss. They are therefore entitled to come to this court for the reliefs sought by them.

For the reasons stated above, I hold that this court has jurisdiction to entertain the application made by the plaintiffs. The jurisdictional summons of the defendants is dismissed with costs.

Application allowed.

Solicitors: *Yip Yeo & Nasrim; Allen & Gledhill.*

Reported by *Teoh Ai Lin*

Karunakaran v Wong Yen Choong & Anor

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22-15-87
LAMIN J
12 JANUARY 1990

Civil Procedure — Registrar's certificate — Variation of — Whether court can discharge or vary registrar's certificate eight days after it had been filed — Whether a case of special circumstances within O 44 r 23(2) existed — Rules of the High Court 1980, O 44 r 23(2)

The plaintiff was the registered owner of certain lands in Pahang, Malaysia. The defendants occupy an adjoining plot of land that encroached on part of the plaintiff's land. The defendants had been undisturbed in their occupation for more than 20 years since 1962/1963. The plaintiff bought his land in March 1984 to make a 'quick profit' as the price was cheap. A firm offer of $12.50 per sq ft was made by another party for the plaintiff's land which the plaintiff accepted. After a week, the prospective purchaser told the plaintiff he was not proceeding with the purchase as the defendant's house encroached on the land. Only then did the plaintiff become aware of the defendant's encroachment. The first defendant was not aware of the encroachment until the suit was commenced. The plaintiff commenced an action by way of summons-in-chambers and sought an order for the demolition of the defendants' premises in the encroached area.

The plaintiff was granted his order as prayed by the registrar and awarded the sum of $65,328 for loss of bargain and costs of $3,000. Interest was subsequently allowed at 8% pa from the date the plaintiff received the offer of purchase and this date was later changed on the draft registrar's certificate to the date of filing of the writ and statement of claim. The defendants appealed against the registrar's decision by filing a notice of appeal to the judge-in-chambers and this was dismissed on procedural grounds. The defendants then filed an application by way of summons-in-chambers to discharge/vary the registrar's certificate under O 44 r 23(3).

Held, allowing the defendants' application:

(1) The defendants are not precluded from making the present application under O 44 r 23 under the res judicata rule after their appeal had been dismissed on procedural grounds. The general rule of res judicata cannot succeed as a defence as there had not been a decision on the merits. The process under O 44 r 23(3) was available to the defendants.

(2) Although the registrar's certificate becomes binding after eight clear days, the court has a discretion to entertain an application to hear the same issue provided 'special circumstances' could be shown. In this case, the registrar's award was improper and illegal and, together with the interest as levied and the costs as ordered, had caused a miscarriage of justice for the following reasons:

(a) a wrong principle of law in making the award had been applied and the award was grossly wrong in law. The 'loss of bargain' rule for the assessment of damages should not have been applied in the present case as the defendants were not parties to any contract of sale affecting the plaintiff's land and there was no question of a breach of any contract of sale between them. Neither could the 'letting value' rule be applied as there was no evidence of letting of that portion of the land encroached on and the facts of the case did not justify such a claim;

(b) the date from which interest was to run was a departure from the rule that interest should run from the date of judgment;
(c) the costs of $3,000 awarded was never consented to and the registrar ought to have ruled for costs to be taxed.

Cases referred to

1 *SCF Finance Co Ltd* v *Masri & Anor* (No 3) [1987] 1 All ER 194 (refd)
2 *Lee Sem Yoong* v *Leong Yoong* [1967] 2 MLJ 86 (folld)
3 *Ratnam* v *Cumaraswamy & Anor* [1965] 1 MLJ 228 (refd)
4 *Abdul Majeed* v *Yeo Chng Tay* [1964] MLJ 75 (refd)
5 *Haji Mohamad bin Suboh* v *Devadas* [1981] 1 MLJ 136 (refd)
6 *Sinnathamby & Anor* v *Lee Chooi Ying; Brijkishore & Anor* v *Lee Chooi Ying* [1987] 1 MLJ 110 (refd)
7 *Swordheath Properties Ltd* v *Tabet & Ors* [1979] 1 All ER 240 (refd)
8 *VL Ittiachen* v *Ho Nah Kang* [1983] 2 MLJ 373 (refd)
9 *Tay Tuan Kiat & Anor* v *Pritam Singh Brar* [1987] 1 MLJ 276 (refd)
10 *Central Malaysia Development Co Ltd* v *Chin Pak Chin* [1967] 2 MLJ 174 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 11, O 44 r 23

SS Muker (*Raymond Ho* with him) for the defendants/appellants.

M Pathmanathan for the plaintiff/respondent.

Cur Adv Vult

Lamin J: The plaintiff is the registered owner of lot 3928, Geran no 1669 mukim Gali, Raub, Pahang. The defendants are occupying the adjoining lot 3929, Geran no 1670. The plaintiff in his statement of claim (encl 2) is alleging wrongful occupation and therefore trespass by the defendants of a portion of his land amounting to 768 sq ft and thus depriving him of the use and enjoyment of the said area. In fact, part of the defendants' house is standing in the said encroached area.

The plaintiff, on 4 April 1987, filed an application by way of summons-in-chambers (encl 6) for an order:

(a) that the defendants do demolish and remove that portion of their premises together with the chain-link fence and the concrete drain found in the encroached area, and
(b) in default of so doing the plaintiff be at liberty to demolish the same.

The learned senior assistant registrar on 18 April 1987 heard the application and granted the order as prayed. Pursuant to the said order, proceedings for the assessment of damages were held on 25 July 1987 and on the same day she awarded the plaintiff a sum of $65,328 being loss of bargain and costs of $3,000. On 27 July 1987, the defendants filed a notice of appeal to the judge-in-chambers (encl 16). On 28 July 1987, the plaintiff's solicitors sent a draft order to the defendants' solicitors for approval and the same was duly amended, approved and returned to the plaintiff's solicitors the same day. On 5 August 1987, the plaintiff's solicitors served on the defendants' solicitors a copy of the summons-in-chambers (encl 20), an application to amend the order of the learned senior assistant registrar dated 25 July 1987:

> ... that the order of the senior assistant registrar dated 25 July 1987 be amended pursuant to O 20 r 11 of the Rules of the High Court 1980 in the manner shown in red in the proposed amended order annexed herewith.

The proposed amended order (as emphasized) reads:

> ... it is ordered that the defendants do pay the damages assessed at $65,328 *together with interest thereon at 8% pa from 1 November 1984 to date of realization* and it is also ordered that the defendants do pay the plaintiffs the sum of $3,000 being the costs of the application herein and this suit.

On 10 August 1987, she allowed the application as prayed. On 20 August 1987, the plaintiff's solicitors served on the defendants' solicitors the registrar's certificate dated 25 July 1987:

> In pursuance of the order of court dated 18 April 1987 and upon hearing Mr M Pathmanathan of counsel for the plaintiff and Mr Raymond Ho of counsel for the defendants and witnesses MM Thedchana Moorthy and Mr Karunakaran s/o Kuppusamy for the plaintiffs and Mr Wong Yen Choong for the defendants it is ordered that the defendants do pay the damages assessed at $65,328 *together with interest thereon at 8% pa from 20 March 1987 to date of realization* and it is also ordered that the defendants do pay the plaintiffs the sum of $3,000 being costs of the application herein and this suit.

(Please note the difference between the proposed amended order as approved on 10 August 1987 and the registrar's certificate above issued after the approved amendment.)

On 9 May 1988, I dismissed the appeal on procedural grounds. On 23 May 1988, the defendants' solicitors filed the present application (encl 38) by way of summons-in-chambers for the following orders:

(a) that the registrar's certificate dated 25 July 1987 be discharged; and/or
(b) that an extension of time be granted to the defendants to apply to this honourable court to vary the registrar's certificate pursuant to O 44 r 23 of the Rules of the High Court 1980; and/or
(c) that the registrar's certificate be varied; and
(d) that the plaintiff do bear the costs of this application.

I wish to note at this stage that the house in which the defendants are now occupying was built by the father of the first defendant between 1962-1963 and part of it is the subject matter of the present dispute as it is lying within the encroached area. So the first defendant and his family and the second defendant (the mother of the first defendant) had been staying in that house for more than 20 years undisturbed. Only about the month of March 1984 did the plaintiff come to purchase the adjoining land at the price of $56,328. He purchased it merely to make a 'quick profit' as the price was cheap. He then passed the word round that he was putting up the land for sale and he also placed an

advertisement. According to him, one intending purchaser, a Chinese gentleman, made a firm offer of $12.50 per sq ft which he accepted. But after a week, the Chinese gentleman came to tell him that he was not buying the land as the defendants' house had encroached on the land. Only then did the plaintiff become aware of the encroachment and even then he did not approach the defendants about solving the problem. As for the first defendant, he was not aware of the encroachment until the filing of the present suit which was served on him in April 1987.

The first question which needs answering at this stage, I think, is whether the defendants are precluded from making the present application (encl 38) after their appeal has been dismissed. (It was dismissed on 9 May 1988.) The appeal was on the order of the learned senior assistant registrar made on 25 July 1987. Their appeal was dismissed for having adopted the wrong procedure because O 44 r 23(1) of the Rules of the High Court 1980 requires that if a registrar's certificate is to be discharged or varied, it may be done by applying to the judge by way of summons (and not by filing an appeal) and that too must be done not later than eight clear days after the filing of the registrar's certificate. In the present case, eight clear days had passed. It was submitted before me that the general rule of res judicata would apply in the present case and cited the case of *SCF Finance Co Ltd* v *Masri & Anor (No 3)*;[1] the relevant headnote reads:

> An order dismissing proceedings, even where there has been no argument or evidence directed to the merits of the case, was capable of giving rise to an issue estoppel if the litigant had put forward a positive case as the basis for applying for the relief sought in the proceedings but at trial had declined to continue with the proceedings and had submitted to the order dismissing them. Furthermore, the fact that on the dismissal of the proceedings the litigant had expressly reserved the very issue that was to have been tried did not necessarily prevent the general rule of res judicata applying, namely, that it was an abuse of process to raise in subsequent proceedings an issue which could have been litigated in earlier proceedings.

In the case of *Lee Sem Yoong* v *Leong Yoong*,[2] Gill J (as he then was) said at p 88:

> For the doctrine of res judicata to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it ... It is abundantly clear from the above judgment that the learned President did not go into the merits of the case and dismissed the action on the ground that the plaintiff was then not the registered owner of the land and that in his opinion he had no jurisdiction to hear the case on its merits.

I therefore do not think that the general rule of res judicata can succeed as a defence as there was no decision on the merits and that the process under O 44 r 23(3) is available to the defendants. After the expiration of eight clear days, the registrar's certificate becomes binding (O 44 r 23(2)) but at any time after the expiration of eight clear days the judge has a discretion to entertain the same issue provided 'special circumstances' can be shown. As regards compliance with procedure and the exercise of discretion by the courts, I take note of what Lord Guest said in *Ratnam* v *Cumaraswamy & Anor*[3] at p 229:

> The court will not interfere unless it is clearly satisfied that the discretion has been exercised on the wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans* v *Bartlam* [1937] AC 473).

It was also argued that a mistake by counsel in opting for a procedure (in this case by filing an appeal and not by filing an application under O 44 r 23(3)) that was later shown to be wrong ought not to succeed as a ground for extension of time and a number of cases were cited in support. Thompson LP in the case of *Abdul Majeed* v *Yeo Chng Tay*[4] said at p 75:

> The ground on which special leave is asked is that the legal adviser of the applicant has made a mistake. He was under the erroneous impression that it was a case where leave was required under s 37 of the Courts Ordinance 1948 and by reason of that mistake got himself out of time for appealing in the ordinary way.
>
> We have considered the matter carefully and we have come to the conclusion that special leave means leave to be granted on account of special circumstances.
>
> In view of the decisions of the English Court of Appeal in *Re Macadam* [1950] 1 All ER 659 and in view of my own decision in the local case of *Wilkins* v *Wilkins* [1951] MLJ 80 which followed the earlier case of *Butler-Madden* v *Krishnasamy* [1947] MLJ 182 and which has been accepted by the profession for the last 13 years, we are of the opinion that the present application is to be decided in the light of what was said in *Re Coles & Ravenshear* [1970] 1 KB 1 and not in the light of what was said in *Catti* v *Shoosmith* [1939] 3 All ER 916.

Ajaib Singh J in the case of *Haji Mohamad bin Suboh* v *Devadas*[5] said at pp 137-138:

> It has been stressed time and again that the rules of procedure must be strictly complied with by all litigants who seek remedy of any kind in a court of law. Any litigant who disregards the rules of procedure does so at his peril and he cannot therefore be heard to say that he has been denied justice in a cause or matter which might otherwise have been favourable to him but for the failure on his part to follow the rules for in such a case he has none but himself to blame for the predicament in which he may find himself. I am of course not unmindful of the oft-quoted dictum of Lord Collins MR in *Re Coles & Ravenshear* [1970] 1 KB 1 which is aptly reproduced at the beginning of *Mallal's Supreme Court Practice* ... The observations of Lord Collins are certainly not meant to excuse recalcitrant litigants who have scant respect for the rules of procedure. The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown ... *Some good grounds* must be shown although in a proper case an extension may be allowed even if the delay is occasioned by a legal adviser who misreads the relevant rules relating to appeals to the High Court ...

In *Sinnathamby & Anor* v *Lee Chooi Ying; Brijkishore & Anor* v *Lee Chooi Ying*,[6] it was argued that with the new r 56 of the Rules of the High Court 1980, the mistake of a legal adviser was no longer a ground for refusing an application for extension of time to appeal. Mohamed Azmi SCJ said at p 112:

> In my view this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under r 56 ... in view of the change in the law which no longer requires 'special leave' where the mistake of a legal adviser is advanced as the reason for the delay, the court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other cases. Thus the rule in *Re Coles & Ravenshear* [1970] 1 KB 1 and as well as *Chong Kueng Ying & Ors* v *Lovis Lavagna* [1972] 1 MLJ 180 which excluded the court's discretion in case where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980.

The award in respect of the assessment of damages in the present case was first made by the learned senior assistant registrar on 25 July 1987 but without making any order relating to interest. On 3 August 1987, the plaintiff's solicitors filed an application by way of summons-in-chambers (encl 20) to amend the said order pursuant to O 20 r 11 of the Rules of the High Court 1980 by inserting the provision relating to interest after the figure $65,328 to read:

> ... together with interest thereon at 8% pa from 1 November 1984 to date of realization.

The learned senior assistant registrar allowed the application on 10 August 1987. It was contended by the defendants' counsel that the said amendment could not be done by way of the slip rule under O 20 r 11 as it was not an accidental omission. The interest in the terms as ordered was never prayed for at the hearing on 25 July 1987 and never was it pleaded in the statement of claim. So it could not have been intended by the court at the time of making the order on 25 July 1987. If I may cite *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 p 255:

> Once a judgment has been passed and entered the court has no jurisdiction to amend it under the 'slip rule' unless there has been an accidental slip in drawing up the judgment, or unless the judgment as drawn up does not correctly state what the court actually decided and intended: *Hock Hua Bank* v *Sahari bin Murid* [1982] 1 MLJ 143.

Further the interest was to commence from 1 November 1984 and that date was about the time when the Chinese gentleman offered to buy at $12.50 per sq ft and the said Chinese informed the plaintiff of the encroachment which was the reason for his refusal to purchase. The plaintiff did not ask the defendants to demolish that portion of the building immediately after having been intimated of the encroachment. This came to light during the proceedings for the assessment of damages. It was only on his own evidence. There was no evidence that the defendants themselves realized the encroachment on that date. On the other hand, the first defendant testified in that hearing that he was not aware of the encroachment until the filing of the suit which was served on him in April 1987. The proposed deal with that Chinese man was even aborted. I am strongly of the view therefore that that date of '1 November 1984' was not only improper but also unjust to serve as a date for the commencement of interest. Then out of the blue there appears on the registrar's certificate filed on 17 August 1987 (encl 23) a different date, ie 20 March 1987 instead of 1 November 1984. There was a draft of course of the certificate with that new date inserted. But there does not appear anywhere an application whether made and the reason for it. However, that date '20 March 1987' is the date of the filing of the writ and the statement of claim. Those two dates, ie 1 November 1984 and 20 March 1987 obviously are a departure from the rule in that the date should be the date of judgment as required under O 42 r 12. Again regarding costs of $3,000 as ordered, it was seriously contested by the defendants in that it was never consented to and that the learned senior assistant registrar ought to have ordered for the costs to be taxed. I should think so. At this point I would like to go into the question of damages proper, ie the amount of $65,328 as ordered. The learned senior assistant registrar awarded that sum as damages for loss of bargain. I wish to stress here once again the point that the total area encroached was only 768 sq ft. The question that needs re-examination is under what circumstances 'loss of bargain' can properly and validly be made a claim in law.

In the case of *Swordheath Properties Ltd* v *Tabet & Ors*,[7] the second and fifth defendants had been staying in Flat 3, 2 Finborough Road, London with the permission of the first defendant since prior to 4 July 1976. The plaintiffs had let the flat to the first defendant for a fixed term beginning April 1976 and ending 4 July 1976. The first defendant left the flat sometime before the expiry of the term. Both the defendants' (second and fifth) right as licensees came to an end, as a matter of law, when the first defendant's right came to an end upon his leaving the premises. But the plaintiffs claimed damages for trespass only with effect from 5 July 1976. Megaw LJ allowed the appeal and said (at p 42):

> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.

In the case of *VL Ittiachen* v *Ho Nah Kang*,[8] the plaintiff was required to deliver vacant possession of the bungalow he was occupying by 30 June 1980. The court decided that

he was a licensee with a contractual right to remain there until 30 June 1980. In the meantime, he went to India and when he returned in January he did not gain entry as the house had been sealed. The plaintiff was accordingly awarded $15,000 as damages on the basis of the letting value of the bungalow, the rental of which has been at $2,500 per month and his right to the continued occupation was for the balance of the period of six months.

In *Tay Tuan Kiat & Anor* v *Pritam Singh Brar*,[9] the defendant had wrongfully built a retaining wall in the plaintiffs' land and as there was no evidence that the plaintiffs had suffered any damage or loss as a result of the trespass, nominal damages of $500 was awarded.

In *Central Malaysia Development Co Ltd* v *Chin Pak Chin*,[10] briefly, the plaintiffs entered into an agreement with one YKK on 22 July 1965 for the sale of lands and received a deposit of $10,000. In an earlier agreement of sale between the plaintiffs and the defendant, the plaintiffs had deposited $60,000 for the purchase of the same lands from the defendant who was to deposit his document of title with the plaintiffs' solicitors upon execution of the agreement. The balance of the purchase price was to be deposited with the defendant's solicitors on or before 31 July 1965. Upon such deposit being made, the defendant was to execute a valid and registrable transfer to deliver vacant possession of the land to the plaintiffs. The defendant failed to honour his part of the bargain and the plaintiffs were therefore entitled to repudiate the contract with the result that the plaintiffs could not sell those same lands to YKK and could not make the profit that he thought he could. On the question of general damages for the breach of the contract by the defendant, counsel for the plaintiffs only asked for loss of profit as the plaintiffs would have made a profit of $56,725 had both transactions been successfully completed. Gill J (as he then was) said at p 176:

> The general rule as regards damages for breach of the contract is to put the plaintiff in the same position as if the contract had been performed, so that normally he is entitled to recover from the defendant his loss of profits, or the benefit of his bargain, as is often called.

Accordingly, the court found in favour of the plaintiffs in that they were entitled to recover the sum of $60,000 which they paid as deposit on the date of the agreement and by way of damages for loss of bargain a sum of $56,725 (of course together with interest as ordered).

In *The Law of Damages and Compensation* by C Kameshwara Rao (Vol I, 5th Ed) at p 558, the rule on loss of bargain in similar situation is stated thus:

> So also, where the failure to complete the sale was not due to a defect in the title, but is the result of the failure of the vendor to redeem the property agreed to be sold the damages cannot be limited to the costs of investigating the title but the vendee is entitled to general damages for loss of bargain ...

Now, the facts of the case before me which I consider relevant for determination are simply that the house which now stands in the land adjoining that of the plaintiff had been built by the first defendant's father (who is now deceased) for more than 20 years prior to the plaintiff's purchase of the adjoining land. Part of the house encroached into the plaintiff's land to the extent of 768 sq ft. The first defendant did not realize the encroachment until he was served with the writ in April 1987. As for the plaintiff, even at the time of purchasing the land, he did not know of the encroachment and I could only assume that he never even cared to find out the true position of the land before he bought it. He was only interested in buying and selling and to make a quick profit so that he only came to know of the encroachment upon being told by one intending purchaser who refused to complete the deal because of the encroachment. In my considered opinion, the rule on 'loss of bargain' cannot apply in the circumstances of the present case. The defendants were and are not parties to any contract of sale affecting the plaintiff's land and so there was no question of a breach of any contract of sale arising so as to grant the plaintiff the benefit of the rule on 'loss of bargain'. The plaintiff was completely oblivious of the encroachment before and at the time he purchased the land. He was only interested in enriching himself as quickly as he could dispose of the land. A defendant to be liable for loss of bargain, as I understand it, must first be a party to the contract of sale and that he has committed a breach of that contract by some default so that transfer of ownership is delayed or made impossible. The defendants in the instant case are nowhere near such a transaction. They are innocent trespassers and if at all, they are liable for simple trespass. Therefore, the award made by the learned senior assistant registrar in the sum of $65,328 for loss of bargain was grossly wrong in law. Neither would the plaintiff be legally entitled to 'letting value' as the facts of the case do not justify such a claim and that there was no evidence of letting of that portion of the land previously and in fact such evidence could not possibly have been forthcoming in the circumstances. I would also like to add that the figure of $65,328 as awarded was arrived at on the basis of an offered purchasing price of $11 per sq ft. Before the Chinese gentleman made an offer of $12.50 per sq ft, an Indian gentleman offered the plaintiff $11 per sq ft. The learned senior assistant registrar chose the lower offered purchasing price of $11 per sq ft. As I see it, had there been no encroachment, anything between those two offered prices may be assumed to reflect somewhat the open market price. Therefore, the $11 per sq ft chosen as the multiplier may be taken as the purchasing price of the land in the open market. The defendants were not going to own the encroached portion of the land because he had been ordered to demolish that part of their house standing in the encroached area and so it was not proper to make them pay the purchasing price as damages. So for the reasons

stated above, I am of the view that the award was improper and illegal and together with the interest as levied and the costs as ordered has caused a miscarriage of justice. In my judgment, therefore, the plaintiff is only entitled to nominal damages for the 768 sq ft of encroachment.

Taking into consideration the circumstances in which the registrar's certificate came to be issued, such as how the amendment came to be made and the application of the wrong applicable law in making the award resulting in handing out for 'loss of bargain' in the sum of $65,328 because of the trespass over 768 sq ft of land, and in view of the circumstances of the whole case, I consider it to be a fit and proper case to be viewed as coming within the term of 'special circumstances' notwithstanding the delay in making the application. Taking into consideration the circumstances of the case, in my judgment $300 is reasonable as nominal damages. I therefore vary the certificate accordingly.

Application allowed.

Solicitors: *Ho, Chong & Menon; Yusuf Lee Pathma & Marbeck.*

Reported by *Teoh Ai Lin*

Muniandy Rengasamy & Ors v Indo Malaysia Engineering Co Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1-31-33-87
ANUAR J
4 JANUARY 1990

Companies and Corporations — Debts — Ranking of — Company placed under receivership — Plaintiffs' employment terminated — Whether termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice are workers' compensation under Companies Act 1965 — Whether such claims rank in priority to debenture holders — Companies Act 1965, s 292(1)(c) — Employment Act 1955, s 69

Labour Law — Compensation — Whether compensation under Employment Act 1955 falls within s 292(1)(c) of Companies Act 1965 — Whether termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice rank in priority to debenture holders — Employment Act 1955, s 69 — Companies Act 1965, s 292(1)(c)

The plaintiffs were employees of the defendant company, which was placed under receivership. The receivers terminated their services and the plaintiffs lodged a complaint to the Commissioner for Labour under s 69 of the Employment Act 1955 against the defendant company for non-payment of termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice. The Commissioner for Labour ordered the defendant to pay the plaintiffs $1,778,795.79, being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice. The issue is whether such claims rank in priority over debenture holders under s 292(1)(c) of the Companies Act 1965.

Held, allowing the plaintiffs' application:

(1) The Companies Act 1965 is silent as to the provision of the order made by the Commissioner for Labour. However, s 292(1)(c) of the Companies Act 1965 provides that all amounts due in respect of workers' compensation accrued before the commencement of winding up shall be paid in priority to other unsecured debts.

(2) The words used in s 292(1)(c) are general and capable of wide interpretation, providing for 'workers' compensation under any written law relating to workers' compensation'. This leaves sufficient scope to include compensation under any written law. Compensation under s 69 of the Employment Act 1955 therefore falls under s 292(1)(c) of the Companies Act 1965.

[*Editorial Note*: The defendant's appeal to the Supreme Court vide Civil Appeal No 02-194 of 1989 was heard on 14 February 1990 by the court comprising Harun Hashim, Ajaib Singh and Jemuri Sarjan SCJJ. Judgment was reserved.]

Legislation referred to
Companies Act 1965 ss 191, 292(1)(A), 292(1)(c)
Employment Act 1955 s 69

MS Murthi for the plaintiffs.
Peh Lee Kheng for the defendants.

Cur Adv Vult

Anuar J: This is an application (encl 1) by the plaintiffs by way of originating summons for an order for:

(a) A declaration that, subject to s 191 read with s 292(1)A of the Companies Act 1965, all amounts due to the plaintiffs from Indo Malaysia Engineering Co Bhd, being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice amounting to M$1,778,795.79, rank prior to the debenture holders.

(b) In the alternative, a declaration that the order made on 4 September 1986 by the Commissioner for Labour, Port Klang ordering Indo Malaysia Engineering Co Bhd to pay the plaintiffs a sum of M$1,778,795.79 being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice, ranks prior to the debenture holders subject to s 191 read with s 292(1) A of the Companies Act 1965.

The plaintiffs were the employees of the defendant company. On 11 July 1986, the United Asian Bank Bhd appointed Mr Chua Teong Hooi and Raja Arshad bin Raja Tun Uda as receivers of the defendant company. The receivers terminated the services of the plaintiffs on 11 July 1986. The plaintiffs lodged a complaint to the Commissioner for Labour under s 69 of the Employment Act 1955 against the defendant company for non-payment of termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice. After an inquiry, the Commissioner for Labour ordered the defendant company to pay